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SPEAKING NOTES FOR

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ON THE OCCASION OF A PRESENTATION
TO THE AD HOC COMMITTEE ON SUPREME COURT OF CANADA APPOINTMENTS

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Mr. Chair, distinguished members of the Committee:

It is a privilege and a pleasure to appear before you today on what one might call a historic occasion. For the first time ever, there is a public hearing and prior Parliamentary review of the nominations to the Supreme Court of Canada.

May I begin by recalling and reaffirming two themes which characterized the deliberations of the Parliamentary Justice and Human Rights Committee in the last Parliament, and which underpinned my consultations. First, this public review of the nominations process -- including the public appreciation of the nominees themselves - is a task of great importance to our country. For the Supreme Court -- as the highest appellate court and final arbiter for the resolution of legal disputes - is not only at the pinnacle of our court system, but our court system is a fundamental pillar of our constitutional democracy.

In other words, our Constitution frames both the distribution of governmental power between the federal government and the provinces - otherwise known as legal federalism "or the powers process" - as well as the limits on the exercise of governmental power - whether federal or provincial, otherwise known as human rights, or the "rights process."

It is the Supreme Court of Canada which has the constitutional responsibility of holding governments to account when they trespass these limits, either by way of a jurisdictional trespass in the matter of federal-provincial relations, or by way of a rights violation under the *Charter*.

It is a constitutional responsibility, it should be noted, that Parliament has vested in the Supreme Court; and it is a responsibility that the Supreme Court has discharged with the requisite expertise, diligence and fairness.

Indeed, unlike some other jurisdictions, there has not been an attribution of "partisanship" to the Supreme Court, or to the opinions of its members; nor has there been a suggestion that the appointments themselves were ever motivated by partisan considerations, or that the appointments process has been "politicized."

Accordingly, it is not surprising that a second theme that characterized the deliberations of the Parliamentary Committee-- and was reflected in my consultations and finds expression in the academic commentary on the Court -- is that of the Supreme Court of Canada as the exemplar of

excellence, whose judicial legacy has resonated beyond Canada.

For it is not only Canadians that are proud of our Supreme Court -- as they should be; rather, the Court is respected throughout the country -- indeed, around the world -- as a model of what a vital, learned, and independent judicial institution should be. As the representatives from Quebec, Ontario and elsewhere testified before the Standing Committee on Justice and Human Rights, the quality of Supreme Court judges has been "impeccable"; and as Court scholars have noted in their writings, Supreme Court decisions are constantly cited by courts in diverse jurisdictions across the globe. We are trustees of this incredible legacy. It is our responsibility to preserve it, and I believe that the two nominees will enhance this legacy.

May I turn now to a brief background overview of the appointments process to date organized around two principles: first, the constitutional framework that governs these appointments; and second, the consultative process which has developed over time to give expression to - or which seeks to implement - this constitutional responsibility.

I will begin with the constitutional framework. At present, it should be noted, the *Supreme Court Act* vests the constitutional authority for the appointment of Supreme Court judges with the executive branch of government - or Cabinet - by way of Order in Council appointment, and the executive remains responsible and accountable for the exercise of this important power. The threshold consideration in this appointments process is to get the best possible candidates and the best possible Court.

Accordingly, as I mentioned, to implement this constitutional responsibility, and secure the best candidates, a comprehensive consulting process has been developed.
Regrettably, this process has never been well known - indeed, it may still be said to be relatively unknown - and this has led some to believe that the process may be both secret and partisan.

The point is that the process has not been so much secretive as unknown. Accordingly, these hearings - and my presentation today - not unlike my earlier appearance before the Justice Committee in March, are intended to fulfil this Government's commitment - and that of the Prime Minister - to increase transparency and to involve parliamentarians in a prior review of nominees for Supreme Court.

Indeed, I am not unmindful that the Supreme Court appointments process has been critiqued not with regard to the quality of appointments, but with respect to the lack of transparency and Parliamentary input. And, yes, there has been a lack of transparency, an absence of Parliamentary input, and very little by way of public involvement. This is what we are seeking to reform and rectify.

This public hearing -- like the prior Parliamentary hearings with its publication of the Protocol of Consultation -- marks an important value- added dimension in the interests of increased transparency, Parliamentary participation, improved public awareness and understanding, and a better appreciation of the merits of the individual nominees and the strengths that they bring to the Court.

The inclusion of representatives of the Canadian Judicial Council and the Law Society of Upper Canada is also intended to strengthen the process by ensuring that the perspective of the judiciary and the legal community is reflected in our review.

I want to take this opportunity to thank all the parties for cooperating together to make this public review process possible; a review process, which, as I said yesterday, reflects an all-party understanding that we want greater openness and greater Parliamentary input while at the same time protecting the integrity of the Court and the judiciary.

I am not so presumptuous as to consider that this process is the perfect panacea for everyone.

But I believe that it is a good beginning for an interim process necessarily constrained by the exigencies of time and decision; that it strikes the right balance while providing, Canadians with a greater appreciation for the outstanding qualities and qualifications for those nominated to our top court, while avoiding the prospectively prejudicial spectacle of potential justices being cross-examined on personal matters as we've seen in other jurisdictions.

Indeed, the public attention that has been paid to the nominations process and the nominees themselves, and the interest in our proceedings here today, only serve to underscore the importance of our task; and it prompted also my appearance before the Justice Committee in March this year to describe then the process of comprehensive consultations that I would be undertaking in selecting these nominees.

At this point, I wish to congratulate the members of that Justice Committee, some of whom are also members of this Ad Hoc Committee, who did an excellent job of canvassing a wide range of perspectives on this issue. I also appreciate the time and efforts of those who provided submissions or appeared before the Justice Committee.

In my March presentation, I also identified the criteria I would use in assessing the merit of potential candidates. Indeed, this was the template that I followed in conducting my consultations.

May I now turn to a description of this consultation process. As you know, the two vacancies were caused by the resignations of Madam Justice Arbour and Mr. Justice Iacobucci. The contributions of these two exceptional individuals to the life and work of the Court will be greatly missed. Both of these eminent Justices were from Ontario. So my focus in filling the vacancies caused by their retirements was on candidates from that province.

In March, as you will recall, I advised the Justice Committee that the Minister of Justice consults with the following:

- the Chief Justice of Canada and perhaps other members of the Supreme Court of Canada;
- the Chief Justices of the courts of the relevant region;
- the Attorneys General of the relevant region;
- at least one senior member of the Canadian Bar Association;
- at least one senior member of the Law Society of the relevant region.

That is the Protocol of consultation; and that is what I did. I met with:

- the Chief Justice of Canada, Beverley McLachlin;
- the Attorney General of Ontario, Michael Bryant;
- the Chief Justice of Ontario, Roy McMurtry;
- the Treasurer of the Law Society of Upper Canada, Frank Marrocco;
- the President of the Canadian Bar Association, William Johnson; and
- the President of the Ontario Bar Association, Jonathan Spiegel.

I also mentioned in my March presentation to the Justice Committee that I would consider input from any interested person - whether from academia, organizations or individuals.

How did the consultations proceed? In my initial discussions, I made a point of specifying the merit-based criteria on which my recommendation was going to be based. These were set out in my March presentation to the Justice Committee but, with your indulgence, I will repeat them.

They were and are:

a. Professional Capacity

- highest level of proficiency in the law, superior intellectual ability and analytical and written skills;
- proven ability to listen and to maintain an open mind while hearing all sides of an argument; decisiveness and soundness of judgement;
- capacity to manage and share consistently heavy workload in a collaborative context;
- capacity to manage stress and the pressures of the isolation of the judicial role;
- strong cooperative interpersonal skills;
- awareness of social context;
- bilingual capacity; and
- specific expertise required for the Supreme Court.

b. Personal Characteristics

- highest level of personal and professional ethics: honesty; integrity; candour;
- respect and consideration for others: patience; courtesy; tact; humility; fairness; tolerance; and
- personal sense of responsibility: common sense; punctuality; reliability.

c. Diversity on the Court

Those are the criteria.

My initial consultations addressed the identification of candidates. As could be expected, the pool of candidates came from the Ontario Court of Appeal but also from the Ontario Superior Court and distinguished lawyers from private practice.

I can tell you - and most of the people I consulted said this as well - that we had an embarrassment of riches to choose from to fill these positions. There are a large number of excellent people in Ontario who would have been very suitable appointees. This made our job very difficult.
In order to assess the candidates, I met with each of the people I mentioned earlier. Indeed, I consulted them several times so as to verify information which I had received and to assess whether a point of view expressed by one person was shared by the others. Potential candidates may have been identified later on in the process, at which point I would again go back and seek the views of people I had previously spoken to. I point this out to suggest that the consultations were not a one-shot exchange where I spoke to each person once and that's it. Rather, there was an ongoing and overlapping dialogue between me and the other consultees.

In assessing the candidates, I asked questions that were related to the criteria mentioned earlier. Again, I cannot stress enough that the main focus was merit. Although my discussions were confidential, I can tell you that some of the consultees were particularly well-placed to provide certain types of input - for example, the Chief Justice of Canada on the expertise required for the Court; the Chief Justice of Ontario on issues such as collegiality and ability to handle a heavy workload; and the Attorney General of Ontario;, the Law Society; and the CBA on the candidate's reputation in the legal community.

As I mentioned earlier, the outstanding talent pool made this an exceedingly difficult choice. However, as the process developed, which included my consulting the opinions and writings of the candidates, we were eventually able to narrow it down to the two nominees - the Honourable Rosalie Abella and the Honourable Louise Charron. In our view, these are two outstanding jurists

who will make a significant and lasting contribution to the work of the Supreme Court.

I will describe the nominees in order of precedence; that is, the order in which they were first appointed to the Bench.

The first nominee that I wish to speak about is Madam Justice Rosalie Abella, whose reputation as an outstanding jurist is known internationally.

The basic biographical data on Justice Abella are as follows. Justice Abella was born in 1946 in a displaced persons camp in Germany and came to Canada as a refugee. She received a Bachelor of Laws from the University of Toronto in 1970 and was called to the Ontario Bar in 1972.

She was first appointed to the Ontario Family Court in 1976 and was appointed to the Ontario Court of Appeal in 1992.

The Honourable Rosalie Abella has chaired the Ontario Labour Relations Board, the Ontario Law Reform Commission and the Study on Access to Legal Services by the Disabled. She was also a member of the Ontario Human Rights Commission, the Ontario Public Service Labour Relations Tribunal and the Canadian Judicial Council's Inquiry on Donald Marshall Jr. As well, she was sole Commissioner of the 1984 Royal Commission on Equality in Employment.

Madam Justice Abella is the author of numerous legal publications and is a frequent lecturer, both in Canada and internationally. She has taught at McGill Law School as the Boulton Visiting Professor, and was Distinguished Visiting Faculty lecturer at the University of Toronto Law School. She has been awarded 20 honourary degrees, including an honourary doctorate from the Law Society of Upper Canada, and is a Fellow of the Royal Society of Canada. She was recently the recipient of the Justice Walter Tarnopolsky Medal, awarded jointly by the Canadian Bar Association and the International Commission of Jurists.

I spoke earlier of the professional and personal criteria used in my consultations to assess the candidates for the two appointments to the Supreme Court of Canada. Without repeating all of these criteria in detail, may I share with you commentary on the professional capacity and personal characteristics of Justice Abella that I received during my consultations.

Members of the committee will understand and have been advised that, due to the confidential nature of my consultations, I will be sharing with you the comments received without attributing them to anyone specifically.

Justice Abella has been described as having superior intellectual ability and analytical skills, and with a unique blend of experience and expertise. She is publicly recognized for her expertise in human rights and equality, having developed the concept of "employment equity" as chair of the Royal Commission on Equality in Employment. Indeed, her theories of equality and discrimination were later adopted by the Supreme Court of Canada. She is considered to be an innovative and creative jurist who has had a transformative impact on various areas of the law, but one who proceeds with careful, reasoned, and principled analysis, and appropriate deference to precedent. She is also described as having a particular skill in grappling with competing legal principles and complex fact patterns.

Her writings are clear, well-reasoned and eloquent, distinguished not only by writing of high quality, but by the sheer volume of published articles and books. Not surprisingly, her peers have characterized her as having an incredible capacity for hard work and as a highly experienced judge - she was appointed to the Family Court at 29 years old, making her the youngest female judge ever in Canada.

During her long tenure on the Bench, she has demonstrated an expertise in diverse areas of both public and private law, including constitutional, administration and family law as exemplified in the

following seminal decisions. In the area of family law, for example, Justice Abella, writing for a unanimous panel of the Court of Appeal in *Miglin v. Miglin*, is credited for striking a judicious and compassionate balance between privity of contract and the objective that spouses share equitably in the distribution of the resources upon family breakdown. In *Francis v. Baker*, Justice Abella's unanimous judgment and pioneering approach to child support was upheld by the Supreme Court of Canada, as was the judgment in Miglin.

Her body of constitutional and equality decisions have been characterized as "making an enormous contribution to the development of a rich and substantive -- and in many ways uniquely Canadian -- approach to equality", such as her decisions in the *Essex County Board of Education* case in the matter of minority language educational rights and the protection of the French language; and the *Rosenberg* case, where her unanimous opinion has been upheld in every major Charter decision since, including those rendered by the Supreme Court of Canada.

If I move to personal characteristics, people who know Justice Abella describe her as a person of boundless energy and enthusiasm, as extremely collegial and collaborative and one who simply has extraordinary human qualities. She is regarded as having a good temperament, and as honest, candid, open and with the highest level of integrity.

May I turn now to the second nominee, Madam Justice Louise Charron. Justice Charron, like Justice Abella, is an outstanding nominee with a distinguished and multi-faceted career. She has been a civil litigator, a prosecutor, an academic, a trial judge and an appellate judge.

Her basic biographical data are as follows:

Justice Charron is a Franco-Ontarian, born in Sturgeon Falls. She received a Bachelor of Laws from the University of Ottawa in 1975 and was called to the Ontario Bar in 1977.

She has been a Justice of the Ontario Court of Appeal since 1995. Her first appointment to the Bench was to the District Court of Ontario in 1988, and she has also served as a Deputy Judge of the Nunavut Court of Justice since 1999, with an appreciation of Aboriginal sensibilities.

From 1977 to 1980, the Honourable Louise Charron practised civil litigation with the Ottawa firm of Lalonde, Chartrand & Gouin, and was part-time Assistant Crown Attorney. From 1980 to 1985, she was Assistant Crown Attorney for the Judicial District of Ottawa-Carleton. From 1985 to 1988, Justice Charron was Assistant Professor at the Faculty of Law, University of Ottawa. In 1988, she was appointed to the Ontario Police Commission.

Madam Justice Charron has been very active in judicial education and training, serving as Associate Director of the National Judicial Institute from 1994 to 1996 and during 2003 and 2004. She is the author of various legal publications,- including having co-authored a treatise on "Canadian Criminal Jury Trials" in 1999,- and is a frequent lecturer. She has participated in many professional organizations, including the Association des juristes d'expression française de l'Ontario. She is the recipient of several awards, having received an Honourary Doctorate from the Law Society of Upper Canada, as well as being one of the members of the Common Law Honour Society of the University of Ottawa.

May I turn now more specifically to the professional capacity and personal characteristics of this nominee, basing myself on the comments received during my consultations, as well as my appreciation of her judicial opinions and writings. With respect to proficiency in the law, analytical and written skills, Justice Charron has been described as having a superior command of diverse areas of the law and evidence.

A former Crown Attorney, she is considered an expert in criminal law and with an outstanding reputation in this field. Indeed, in this regard, she shares similarities with Justice Louise Arbour whose vacancy is to be filled. Justice Charron is also known as an excellent writer with a style that

is concise, clear, focused, and of high quality. Her decisions are regarded as templates of judicial reasoning in their identification of the issues; their concise restatement of the law and relevant precedent; the appreciation of their impact on the law and area in question; and their contribution to the advancement and appreciation of process, procedure and substantive law.

As with Justice Abella, she is also highly experienced, having served as a justice at both the trial and appellate levels; and her judgments, at both these levels, have had a transformative impact on criminal jurisprudence, procedure, and evidence.

Indeed, what is most impressive about the opinions of Justice Charron is her command of some of the most difficult and contentious areas of the criminal law, and the influence she has had in the development of criminal jurisprudence, and evidence law.

Even as a trial judge, she authored a series of influential judgments. For example, in a case called *R. v. Fringe Product*, she delivered reasons upholding the obscenity provisions of the *Criminal Code* that were later quoted and relied on by the Supreme Court in the famous case of *R. v. Butler*. In a case called *R. v. Olscamp*, she wrote on an accused's access to expert witnesses.

Her reasoning in that case demonstrated a clear appreciation of the nature of the criminal process, and the effect her decision might have on that process. The compelling nature of her reasoning has been recognized by other courts, including appellate courts in other jurisdictions as well as the Supreme Court of Canada.

As a judge on the Ontario Court of Appeal, her influence has continued to grow as she has authored decisions on some of the most difficult evidentiary issues facing criminal courts including expert evidence (*R. v. K.*); similar fact evidence (*R. v. Handy*); hearsay evidence (*R. v. Perciballi*); and wiretap evidence (*R. v. Shayesteh*). These are the sort of issues that determine, *inter alia*, whether an accused has received a fair trial. She has demonstrated time and again that she has a keen appreciation of what is necessary to ensure the integrity and fairness of the criminal process and the right to a fair trial.

Justice Charron has also been described as a judge who listens carefully to arguments presented before her, is responsive to the presentation of legal argument, is fair towards all parties, and respects precedent while developing principle. She, too, is recognized by her peers as extremely hard working, very collegial and collaborative, and enjoys the highest of respect amongst Bench and Bar.

With respect to personal characteristics, Justice Charron is described as having strong interpersonal skills, as tolerant and patient -- this perhaps not unrelated to her career as a law professor as well as her natural temperament- - and as respectful of Counsel who appear before her as well as of trial judges whose decisions she reviews. She is recognized as having the highest standard of ethics, and as being humble, direct and most of all, fair.

To conclude, let me say -- on a personal as well as professional level -- that it is a very difficult and demanding responsibility to recommend candidates for appointment to the Supreme Court of Canada particularly when there are so many excellent candidates.

As one commentator put it: "I feel enormously blessed to be part of a legal community that can boast of having so many men and women who would be able to make profound and enduring contributions to our highest court and to the country at large."

Indeed, we can all take pride in this extraordinarily talented group of members of the Ontario Bench and Bar. But decisions have to be taken, recommendations need to be made; and in Justices Rosalie Abella and Louise Charron we have two outstanding jurists whose unique repository of experience and expertise -- and remarkable array of professional and personal qualities -- not only commend their elevation to the Supreme Court, but promise that profound

and enduring contribution to Court and country that will inspire us all.

I look forward to answering any questions you may have.

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